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From "Report Presented To The Preliminary Peace Conference by the Commission on The Responsibility of The Authors of The War and on Enforcement of Penalties", March 29, 1919

ANNEX II

Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919.

The American members of the Commission on Responsibilities, in presenting their reservations to the report of the Commission, declare that they are earnestly desirous as the other members of the Commission that those persons responsible for causing the Great War and those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal. The differences which have arisen between them and their colleagues lie in the means of accomplishing this common desire. The American members therefore submit to the Conference on the Preliminaries of Peace a memorandum of the reasons for their dissent from the report of the Commission and from certain provisions for insertion in Treaties with enemy countries, as stated in Annex IV, and suggestions as to the course of action which they consider should be adopted in dealing with the subjects upon which the Commission on Responsibilities was directed to report.

Preliminary to a consideration of the points at issue and the irreconcilable differences which have developed and which make this dissenting report necessary, we desire to express our high appreciation of the conciliatory and considerate spirit manifested by our colleagues throughout the many and protracted sessions of the Commission. From the first of these, held on February 3, 1919, there was an earnest purpose shown to compose the differences which existed, to find a formula acceptable to all, and to render, if possible, a unanimous report. That this purpose failed was not because of want of effort on the part of any member of the Commission. It failed because, after all the proposed means of adjustment had been tested with frank and open minds, no practicable way could be found to harmonize the differences without an abandonment of principles which were fundamental. This the representatives of the United States could not do and they could not expect it of others.

In the early meetings of the Commission and of the Sub-Commissions appointed to consider various phases of the subject submitted to the Commission, the American members declared that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offenses were justiciable and liable to trial and punishment by appropriate tribunals, but that moral offenses, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.

While this principle seems to have been adopted by the Commission in the report so far as the responsibility for the authorship of the war is concerned, the Commission appeared unwilling to apply it in the case of indirect responsibility for violations of the laws and customs of war committed after the outbreak of the war and during its course. It is respectfully submitted that this inconsistency was due in large measure to a determination to punish certain persons, high in authority, particularly the heads of enemy states, even though heads of states were not hitherto legally responsible for the atrocious acts committed by subordinate authorities. To such an inconsistency the American members of the Commission were unwilling to assent, and from the time it developed that this was the unchangeable determination of certain members of the Commission they doubted the possibility of a unanimous report. Nevertheless, they continued their efforts on behalf of the adoption of a consistent basis of principle, appreciating the desirability of unanimity if it could be attained. That their efforts were futile they deeply regret.

With the manifest purpose of trying and punishing those persons to whom reference has been made, it was proposed to create a high tribunal with an international character, and to bring before it those who had been marked as responsible, not only for directly ordering illegal acts of war, but for having abstained from preventing such illegal acts.

Appreciating the importance of a judicial proceeding of this nature, as well as its novelty, the American representatives laid before the Commission a memorandum upon the constitution and procedure of a tribunal of an international character which, in their opinion, should be formed by the union of existing national military tribunals or commissions of admitted competence in the premises. And in view of the fact that "customs" as well as "laws" were to be considered, they filed another memorandum, attached hereto, as to the principles which should, in their opinion, guide the Commission in considering and reporting on this subject.

The practice proposed in the memorandum as to the military commissions was in part accepted, but the purpose of constituting a high tribunal for the trial of persons exercising sovereign rights was persisted in, and the abstention from preventing violations of the laws and customs of war and of humanity was insisted upon. It was frankly stated that the purpose was to bring before this tribunal the ex-Kaiser of Germany, and that the jurisdiction of the tribunals must be broad enough to include him even if he had not directly ordered the violations.

To the unprecedented proposal of creating an international criminal tribunal and to the doctrine of negative criminality the American members refused to give their assent.

On January 25, 1919, the Conference on the Preliminaries of Peace in plenary session recommended the appointment of a Commission to examine and to report to the Conference upon the following five points:—

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1. The responsibility of the authors of the war.
2. The facts as to the violations of the laws and customs of war committed by the forces of the German Empire and its allies, on land, on sea, and in the air during the present war.
3. The degree of responsibility for these crimes attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offenses.
5. Any other matters connate or ancillary to the above points which may arise in the course of the inquiry, and which the Commission finds it useful and relevent to take into consideration.

I.

The conclusions reached by the Commission as to the responsibility of the authors of the war, with which the representatives of the United States agree, are thus stated ——

The war was premeditated by the Central Powers, together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable.

Germany, in agreement with Austria-Hungary, deliberately marked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war.

The American representatives are happy to declare that they not only concur in these conclusions, but also in the process of reasoning by which they are reached and justified. However, in addition to the evidence adduced by the Commission, based for the most part upon official memoranda issued by the various governments in justification of their respective attitudes towards the Serbian question and the war which resulted because of the deliberate determination of Austria-Hungary and Germany to crush that gallant little country which blocked the way to the Dardanelles and to the realization of their larger ambitions, the American representatives call attention to four documents, three of which have been made known by his Excellency Milenko R. Vesnitch, Serbian Minister at Paris. Of the three, the first is reproduced for the first time, and two of the others were only published during the sessions of the Commission.

The first of these documents is a report of Von Wiesner, the Austro-Hungarian agent sent to Serajevo to investigate the assassination at that place on June 28, 1914, of the Archduke Francis Ferdinand, heir to the Austro-Hungarian throne, and the Duchess of Hohenberg, his morganatic wife.

The material portion of this report, in the form of a telegram, is as follows:

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Herr von Wiesner, to the Foreign Ministry, Vienna

Serajevo, July 13, 1914, 1.10 p.m.

Cognizance of the part of the Serbian Government, participation in the murderous assault, or in its preparation, and supplying the weapons, proved by nothing, nor even to be suspected. On the contrary there are indications which cause this to be rejected.

The second is likewise a telegram, dated Berlin, July 25, 1914, from Count Szogyeny, Austro-Hungarian Ambassador at Berlin, to the Minister of Foreign Affairs at Vienna, and reads as follows:

Here it is generally taken for granted that in case of a possible refusal on the part of Serbia, our immediate declaration of war will be coincident with military operations.

Delay in beginning military operations is here considered as a great danger because of the intervention of other Powers.

We are urgently advised to proceed at once and to confront the world with a fait accompli.

The third, likewise a telegram in cipher, marked "strictly confidential," and dated Berlin, July 27, 1914, two days after the Serbian reply to the Austro Hungarian ultimatum and the day before the Austro-Hungarian declaration of war upon that devoted kingdom, was from the Austro-Hungarian Ambassador at Berlin to the Minister of Foreign Affairs at Vienna. The material portion of this document is as follows:

"The Secretary of State informed me very definitely and in the strictest confidence that in the near future possible proposals for mediation on the part of England would be brought to Your Excellency's knowledge by the German Government.

"The German Government gives its most binding assurance that it does not in any way associate itself with the proposals; on the contrary, it is absolutely opposed to their consideration and only transmits them in compliance with the English request."

Of the English propositions, to which reference is made in the above telegram, the following may be quoted, which, under date July 30, 1914, Sir Edward Grey, Secretary of State for Foreign Affairs, telegraphed to Sir Edward Goschen, British Ambassador at Berlin:

"If the peace of Europe can be preserved, and the present crisis safely passed, my own endeavour will be to promote some arrangement to which Germany could be a party, by which she could be assured that no aggressive or hostile policy would be pursued against her or her allies by France, Russia, and ourselves, jointly or separately."

While comment upon these telegrams would only tend to weaken

their force and effect, it may nevertheless be observed that the last of them was dated two days before the declaration of war by Germany against Russia, which might have been prevented, had not Germany, flushed with the hope of certain victory and of the fruits of conquest, determined to force the war.

The report of the Commission treats separately the violation of the neutrality of Belgium and of Luxemburg, and reaches the conclusion, in which the American representatives concur, that the neutrality of both of these countries was deliberately violated. The American representatives believe, however, that it is not enough to state or to hold with the Commission that "the war was premeditated by the Central Powers," that "Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war," and to declare that the neutrality of Belgium, guaranteed by the treaty of the 19th of April, 1839, and that of Luxemburg, guaranteed by the treaty of the 11th of May, 1867, were deliberately violated by Germany and Austria-Hungary. They are of the opinion that these acts should be condemned in no uncertain terms and that their perpetrators should be held up to the execration of mankind.

II.

The second question submitted by the Conference to the Commission requires an investigation of and report upon "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air, during the present war." It has been deemed advisable to quote again the exact language of the submission in that it is at once the authority for and the limitation of the investigation and report to be made by the Commission. Facts were to be gathered, but these facts were to be not of a general but of a very specific kind, and were to relate to the violations or "breaches of the laws and customs of war." The duty of the Commission was, therefore, to determine whether the facts found were violations of the laws and customs of war. It was not asked whether these facts were violations of the laws or of the principles of humanity. Nevertheless, the report of the Commission does not, as in the opinion of the American representatives it should, confine itself to the ascertainment of the facts and to their violation of the laws and customs of war, but, going beyond the terms of the mandate, declares that the facts found and acts committed were in violation of the laws and of the elementary principles of humanity. The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law. The American representatives, therefore, objected to the references to the laws and principles of humanity, to be found in the report, in what they believed was meant to be a judicial proceeding, as, in their opinion, the facts found were to be violations or breaches of the laws and customs of war, and the

persons singled out for trial and punishment for acts committed during the war were only to be those persons guilty of acts which should have been committed in violation of the laws and customs of war. With this reservation as to the invocation of the principles of humanity, the American representatives are in substantial accord with the conclusions reached by the Commission on this head that:

1. The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary principles of humanity.

2. A Commission should be created for the purpose of collecting and classifying systematically all the information already had or to be obtained, in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the Germany Empire and its allies, on land, on sea, and in the air, in the course of the present war.

However, in view of the recommendation that a Commission be appointed to collect further information, the American representatives believe that they should content themselves with a mere expression of concurrence as to the statements contained in the report upon which these conclusions are based.

III.

The third question submitted to the Commission on Responsibilities requires an expression of opinion concerning "the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed." The conclusions which the Commission reached, and which is stated in the report, is to the effect that "all persons belonging to enemy countries, ... without distinction of rank, including chiefs of states, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." The American representatives are unable to agree with this conclusion, insofar as it subjects to criminal, and, therefore, to legal prosecution, persons accused of offences against "the laws of humanity," and insofar as it subjects chiefs of states to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.

Omitting for the present the question of criminal liability for offences against the laws of humanity, which will be discussed in connection with the law to be administered in the national tribunals and the high court, whose constitution is recommended by the Commission, and likewise reserving for discussion in connection with the high court the question of the liability of a chief of state to

criminal prosecution, a reference may properly be made in this place to the masterly and hitherto unanswered opinion of Chief Justice Marshall, in the case of the Schooner Exchange v. McFaddon and Others (7 Cranch, 116), decided by the Supreme Court of the United States in 1812, in which the reasons are given for the exemption of the sovereign and of the sovereign agent of a state from judicial process. This does not mean that the head of the state, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries, a chief executive, thus withdrawing him from the laws of his country, even its organic law , to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

But the law to which the head of the state is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries, and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act.

These observations the American representatives believe to be applicable to a head of a state actually in office and engaged in the performance of his duties. They do not apply to a head of a state who has abdicated or has been repudiated by his people. Proceedings against him might be wise or unwise, but in any event they would be against an individual out of office and not against an individual in office and thus in effect against the state.

The American representatives also believe that the above observations apply to liability of the head of a state for violations of positive law in the strict and legal sense of the term. They are not intended to apply to what may be called political offences and to political sanctions.

These are matters for statesmen, nor for judges, and it is for them to determine whether or not the violators of the treaties guaranteeing the neutrality of Belgium and of Luxemburg should be subjected to a political sanction.

However, as questions of this kind seem to be beyond the mandate of the Conference, the American representatives consider it unnecessary to enter upon their discussion.

IV

The fourth question calls for an investigation of and a report upon "the constitution and procedure of a tribunal appropriate for the trial of these offences." Apparently the Conference had in mind the violations of the laws and customs of war, inasmuch as the Commission is required by the third submission to report upon "the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed." The fourth point relates to the constitution and procedure of a tribunal appropriate for the investigation of these crimes, and to the trial and punishment of the persons accused of their commission, should they be found guilty. The Commission seems to have been of the opinion that the tribunal referred to in the fourth point was to deal with the crimes specified in the second and third submissions, not with the responsibility of the authors of the war, as appears from the following statement taken from the report:

> On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Luxemburg and of Belgium, the Commission is of the opinion that it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures and even to create a special organ in order to deal as they deserve with the authors of such acts.

This section of the report, however, deals not only with the laws and customs of war - improperly adding "and of the laws of humanity" - but also with the "acts which provoked the war and accompanied its inception," which either in whole or in part would appear to fall more appropriately under the first submission relating to the "responsibility of the authors of the war."

Of the acts which provoked the War and accompanied its inception, the Commission, with special reference to the violation of the neutrality of Luxemburg and of Belgium, says: "We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal." And a little later in the same section the report continues: "The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals, and notably the ex-Kaiser, on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith is such that the Commission thinks they should be the subject of a formal condemnation by the Conference." The American representatives are in thorough accord with these views, which are thus formally stated in the first two of the four conclusions under this heading:

> The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

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On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

If the report had stopped here, the American representatives would be able to concur in the conclusions under this heading and the reasoning by which they were justified, for hitherto the authors of war, however unjust it may be in the forum of morals, have not been brought before a court of justice upon a criminal charge for trial and punishment. The report specifically states: (1) that "a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference"; the Commission refused to advise (2) "that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal"; it further holds (3) that "no criminal charge can be made against the responsible authorities or individuals, and notably the ex-Kaiser, on the special head of these breaches of neutrality." The American representatives, accepting each of these statements as sound and unanswerable, are nevertheless unable to agree with the third of the conclusions based upon them:

On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

The American representatives believe that this conclusion is inconsistent both with the reasoning of the section and with the first and second conclusions, and that "in a matter so unprecedented," to quote the exact language of the third conclusion, they are relieved from comment and criticism. However, they observe that, if the acts in question are criminal in the sense that they are punishable under law, they do not understand why the report should not advise that these acts be punished in accordance with the terms of the law. If, on the other hand, there is no law making them crimes or affixing a penalty for their commission, they are moral, not legal, crimes, and the American representatives fail to see the advisability or indeed the appropriateness of creating a special organ to deal with the authors of such acts. In any event, the organ in question should not be a judicial tribunal.

In order to meet the evident desire of the Commission that a special organ be created, without however doing violence to their own scruples in the premises, the American representatives proposed --

The Commission on Responsibilities recommends that:

1. A Commission of Inquiry be established to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.

2. The Commission of Inquiry to consist of two members of the five following Powers: United States of America, British Empire, France, Italy, and Japan; and one member from each of the five following Powers: Belgium, Greece, Portugal, Roumania, and Serbia.

3. The enemy be required to place their archives at the disposal of the Commission, which shall forthwith enter upon its duties and report jointly and separately to their respective governments on the 11th November, 1919, or as soon thereafter as practicable.

The Commission, however, failed to adopt this proposal.

The fourth and final conclusion under this heading declares it to be "desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law." With this conclusion the American representatives find themselves to be in substantial accord. They believe that any nation going to war assumes a grave responsibility, and that a nation engaging in a war of aggression commits a crime. They hold that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and the good faith of nations should be faithfully observed in this as in all other respects. At the same time, given the difficulty of determining whether an act is in reality one of aggression or of defence, and given also the difficulty of framing penal sanctions, where the consequences are so great or may be so great as to be incalculable, they hesitate as to the feasibility of this conclusion, from which, however, they are unwilling formally to dissent.

With the portion of the report devoted to the "constitution and procedure of a tribunal appropriate for the trial of these offences," the American representatives are unable to agree, and their views differ so fundamentally and so radically from those of the Commission that they found themselves obliged to oppose the views of their colleagues in the Commission and to dissent from the statement of those views recorded in the report. The American representatives, however, agree with the introductory paragraph of this section, in which it is stated that "every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes" constituting violations of the laws and customs of war, "if such persons have been taken prisoners or have otherwise fallen into its power." The American representatives are

likewise in thorough accord with the further provisions that "each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal military or civil, for the trial of such cases." The American representatives concur in the view that "these courts would be able to try the incriminated persons according to their own procedure," and also in the conclusion that "much complication and consequent delay would be avoid which would arise if all such cases were to be brought before a single tribunal," supposing that the single tribunal could and should be created. In fact, these statements are not only in accord with but are based upon the memorandum submitted by the American representatives, advocating the utilization of the military commission or tribunals either existing or which could be created in each of the belligerent countries, with jurisdiction to pass upon offences against the laws and customs of war committed by the respective enemies.

This memorandum already referred to in an earlier paragraph is as follows:

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;

2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;

3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal.

4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and

5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.

In a matter of such importance affecting not one but many countries and calculated to influence their future conduct, the American representatives believed that the nations should use the

machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precent, practice, or procedure. They further believed that, if an act violating the laws and customs of war committed by the enemy affected more than one country, a tribunal could be formed of the countries affected by uniting the national commissions or courts thereof, in which event the tribunal would be formed by the mere assemblage of the members, bringing with them the law to be applied, namely, the laws and customs of war, and the procedure, namely, the procedure of the national commissions or courts. The American representatives had especially in mind the case of Henry Wirz, commandant of the Confederate prison at Andersonville, Georgia, during the war between the States, who, after that war, was tried by a military commission, sitting in the city of Washington, for crimes contrary to the laws and customs of war, convicted thereof, sentenced to be executed, and actually executed on the 11th November, 1865.

While the American representatives would have preferred a national military commission or court in each country, for which the Wirz case furnished ample precedent, they were willing to concede that it might be advisable to have a commission of representatives of the competent national tribunals to pass upon the charges, as stated in the report:

(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines were prisoners of more than one nationality were forced to work.

(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct towards several of the Allied armies.

The American representatives are, however, unable to agree that a mixed commission thus composed should, in the language of the report, entertain charges:

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war, it being understood that no such abstention shall constitute a defence for the actual perpetrators.

In an earlier stage of the general report, indeed, until its final revision, such persons were declared liable because they "abstained from preventing, putting an end to, or repressing, violations of the laws or customs of war." To this criterion of liability the American representatives were unalterably opposed. It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission. To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected. The difficulty in the matter of abstention was felt by the Commission, as to make abstention punishable might tend to exonerate the person actually committing the act. Therefore the standard of liability to which the American representatives objected was modified in the last sessions of the Commission, and the much less objectionable text, as stated above, was adopted and substituted for the earlier and wholly inadmissible one.

There remain, however, two reasons, which, if others were lacking, would prevent the American representatives from consenting to the tribunal recommended by the Commission. The first of these is the uncertainty of the law to be administered, in that liability is made to depend not only upon violations of the laws and customs of war, but also upon violations "of the laws of humanity." The second of these reasons is that heads of states are included within the civil and military authorities of the enemy countries to be tried and punished for violations of the laws and customs of war and of the laws of humanity. The American representatives believe that the Commission has exceeded its mandate in extending liability to violations of the laws of humanity, inasmuch as the facts to be examined are solely violations of the laws and customs of war. They also believe that the Comission erred in seeking to subject heads of states to trial and punishment b a tribunal to whose jurisdiction they were not subject when the alleged offences were committed.

As pointed out by the American representatives on more than one occasion, war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers

existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity. The law of humanity, or the principle of humanity, is much like equity, whereof John Selden, as wise and cautious as he was learned, aptly said:

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

While recognizing that offences against the laws and customs of war might be tried before and the perpetrators punished by national tribunals, the Commission was of the opinion that the graver charges and those involving more than one country should be tried before an international body, to be called the High Tribunal, which "shall be composed of three persons appointed by each of the following governments: The United States of America, the British Empire, France, Italy, and Japan, and one person appointed by each of the following governments: Belgium, Greece, Poland, Portugal, Roumania, Serbia, and Czecho-Slovakia"; the members of this tribunal to be selected by each country "from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above." The law to be applied is declared by the Commission to be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." The punishment to be inflicted is that which may be imposed "for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person." The cases selected for trial are to be determined and the prosecutions directed by "a prosecuting commission" composed of a representative of the United States of America, the British Empire, France, Italy, and Japan, to be assisted by a representative of one of the other governments, presumably a party to the creation of the court or represented in it.

The American representatives felt very strongly that too great attention could not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations. They were of the opinion that an act could not be a crime in the legal sense of the word, unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted. They

were perhaps more conscious than their colleagues of the difficulties involved, inasmuch as this question was one that had arisen in the American Union composed of States, and where it had been held in the leading case of United States v. Hudson (7 Branch, 32), decided by the Supreme Court of the United States in 1812, that "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence." What is true of the American States must be true of this looser union which we call the Society of Nations. The American representatives know of no international status of convention making a violation of the laws and customs of war - not to speak of the laws or principles of humanity - an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence. They felt, however, that the difficulty, however great, was not insurmountable, inasmuch as the various states have declared certain acts violating the laws and customs of war to be crimes, affixing punishments to their commission, and providing military courts or commissions within the respective states possessing jurisdiction over such offence. They were advised that each of the Allied and Associated States could create such a tribunal, if it had not already done so. Here then was at hand a series of existing tribunal or tribunals that could lawfully be called into existence in each of the Allied or Associated countries by the exercise of their sovereign powers, appropriate for the trial and punishment within their respective jurisdictions of persons of enemy nationality, who during the war committed acts contrary to the laws and customs of war, insofar as such acts affected the persons or property of their subjects or citizens, whether such acts were committed within portions of their territory occupied by the enemy or by the enemy within its own jurisdiction.

The American representatives therefore proposed that acts affecting the persons or property of one of the Allied or Associated Governments should be tried by a military tribunal of that country; that acts involving more than one country, such as treatment by Germany of prisoners contrary to the usages and customs of war, could be tried by a tribunal either made up of the competent tribunals of the countries affected or of a commission thereof possessing their authority. In this way existing national tribunals or national commissions which could legally be called into being would be utilized, and not only the law and the penalty would be already declared, but the procedure would be settled.

It seemed elementary to the American representatives that a country could not take part in the trial and punishment of a violation of the laws and customs of war committed by Germany and her Allies before the particular country in question had become a party to the war against Germany and her Allies; that consequently the United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war,

unless such violations were committed upon American persons or American property, and that the United States could not properly take part in the trial and punishment of persons accused of violations of the laws and customs of war committed by the military or civil authorities of Bulgaria or Turkey.

Under these conditions and with these limitations the American representatives considered that the United States might be a party to a high tribunal, which they would have preferred to call, because of its composition, the Mixed or United Tribunal or Commission. They were averse to the creation of a new tribunal, of a new law, of a new penalty, which would be ex post facto in nature, and thus contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities. They believed, however, that the United States could co-operate to this extent by the utilization of existing tribunals, existing laws, and existing penalties. However, the possibility of co-operating was frustrated by the insistence on the part of the majority that criminal liability should, in excess of the mandate of the Conference, attach to the laws and principles of humanity, in addition to the laws and customs of war, and that the jurisdiction of the high court should be specifically extended to "the heads of states."

In regard to the latter point, it will be observed that the American representatives did not deny the responsibility of the heads of states for acts which they may have committed in violation of law, including, insofar as their country is concerned, the laws and customs of war, but they held that heads of states are, as part of the people, in whom the sovereignty of any states resides, responsible to the people for the illegal acts which they may have committed, and that they are not and that they should not be made responsible to any other sovereignty.

The American representatives assumed, in debating this question, that from a legal point of view the people of every independent country are possessed of sovereignty, and that that sovereignty is not held in that sense by rulers; that the sovereignty which is thus possessed can summon before it any person, no matter how high his estate, and call upon him to render an account of his official stewardship; that the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty; that in the exercise of sovereign powers which have been conferred upon him by the people, a monarch or head of state acts as their agent; that he is only responsible to them; and that he is responsible to no other people or group of people in the world.

The American representatives admitted that from the moral point of view the head of a state, be he termed emperor, king, or chief executive, is responsible to mankind, but that from the legal point

of view they expressed themselves as unable to see how any member of the Commission could claim that the head of a state exercising sovereign rights is responsible to any but those who have confided those rights to him by consent expressed or implied.

The majority of the Commission, however, was not influenced by the legal argument. They appeared to be fixed in their determination to try and punish by judicial process the "ex-Kaiser" of Germany. That there might be no doubt about their meaning, they insisted that the jurisdiction of the high tribunal whose constitution they recommended should include the heads of states, and they therefore inserted a provision to this effect in express words in the clause dealing with the jurisdiction of the tribunal.

In view of their objections to the uncertain law to be applied, varying according to the conception of the members of the high court, as to the laws and principles of humanity, and in view also of their objections to the extent of the proposed jurisdiction of that tribunal, the American representatives were constrained to decline to be a party to its creation. Necessarily they declined the proffer on behalf of the Commission that the United States should take part in the proceedings before that tribunal, or to have the United States represented in the prosecuting commission charged with the "duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it." They therefore refrained from taking further part either in the discussion of the constitution or of the procedure of the tribunal.

It was an ungracious task for the American representatives to oppose the views of their colleagues in the matter of the trial and punishment of heads of states, when they believed as sincerely and as profoundly as any other member that the particular heads of states in question were morally guilty, even if they were not punishable before an international tribunal, such as the one proposed, for the acts which they themselves had committed or with whose commission by others they could be justly taxed. It was a matter of great regret to the American representatives that they found themselves subjected to criticism, owing to their objection to declaring the laws and principles of humanity as a standard whereby the acts of their enemies should be measured and punished by a judicial tribunal. Their abhorrence for the acts of the heads of states of enemy countries is no less genuine and deep than that of their colleagues, and their conception of the laws and principles of humanity is, they believe, not less enlightened than that of their colleagues. They considered that they were dealing solely with violations of the laws and customs of war, and that they were engaged under the mandate of the conference in creating a tribunal in which violations of the laws and customs of war should be tried and punished. They therefore confined themselves to law in its legal sense, believing that in so doing they

accorded with the mandate of submission, and that to have permitted sentiment or popular indignation to affect their judgment would have been violative of their duty as members of the Commission on Responsibilities.

They submit their views, rejected by the Commission, to the Conference, in full confidence that it is only through the administration of law, enacted and known before it is violated, that justice may ultimately prevail internationally, as it actually does between individuals in all civilized nations.

MEMORANDUM ON THE PRINCIPLES WHICH SHOULD DETERMINE INHUMAN AND IMPROPER ACTS OF WAR

To determine the principles which should be the standard of justice in measuring the charge of inhuman or atrocious conduct during the prosecution of a war, the following propositions should be considered:

1. Slaying and maiming men in accordance with generally accepted rules of war are from their nature cruel and contrary to the modern conception of humanity.

2. The methods of destruction of life and property in conformity with the accepted rules of war are admitted by civilized nations to be justifiable and no charge of cruelty, inhumanity, or impropriety lies against a party employing such methods.

3. The principle underlying the accepted rules of war is the necessity of exercising physical force to protect national safety or to maintain national rights.

4. Reprehensible cruelty is a matter of degree which cannot be justly determined by a fixed line of distinction, but one which fluctuates in accordance with the facts in each case, but the manifest departure from accepted rules and customs of war imposes upon the one so departing the burden of justifying his conduct, as he is prima facie guilty of a criminal act.

5. The test of guilt in the perpetration of an act, which would be inhuman or otherwise reprehensible under normal conditions, is the necessity of that act to the protection of national safety or national rights measured chiefly by actual military advantage.

6. The assertion by the perpetrator of an act that it is necessary for military reasons does not exonerate him from guilt if the facts and circumstances present reasonably strong grounds for establishing the needlessness of the act or for believing that the assertion is not made in good faith.

7. While an act may be essentially reprehensible and the perpetrator entirely unwarranted in assuming it to be necessary from a military point of view, he must not be condemned as wilfully violating the laws and customs of war or the principles of humanity unless it can be shown that the act was wanton and without reasonable excuse.

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8. A wanton act which causes needless suffering (and this includes such causes of suffering as destruction of property, deprivation of necessaries of life, enforced labor, etc.) is cruel and criminal. The full measure of guilt attaches to a party who without adequate reason perpetrates a needless act of cruelty. Such an act is a crime against civilization, which is without palliation.

9. It would appear, therefore, in determining the criminality of an act, that there should be considered the wantonness or malice of the perpetrator, the needlessness of the act from a military point of view, the perpetration of a justifiable act in a needlessly harsh or cruel manner, and the improper motive which inspired it.

ROBERT LANSING

JAMES BROWN SCOTT.

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ANNEX III.

Reservations by the Japanese Delegation.

The Japanese Delegates on the Commission on Responsibilities are convinced that many crimes have been committed by the enemy in the course of the present war in violation of the fundamental principles of international law, and recognize that the principal responsibility rests upon individual enemies in high places. They are consequently of opinion that, in order to re-establish for the future the force of the principles thus infringed, it is important to discover practical means for the punishment of the persons responsible for such violations.

A question may be raised whether it can be admitted as a principle of the law of nations that a high tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side, who may be presumed to be guilty of a crime against the laws and customs of war. It may further be asked whether international law recognizes a penal law as applicable to those who are guilty.

In any event, it seems to us important to consider the consequences which would be created in the history of international law by the prosecution for breaches of the laws and customs of war of enemy heads of states before a tribunal constituted by the opposite party.

Our scruples become still greater when it is a question of indicting before a tribunal thus constituted highly placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war, as is provided in clause (c) of section (b) of Chapter IV.

It is to be observed that to satisfy public opinion of the justice of the decision of the appropriate tribunal, it would be better to rely upon a strict interpretation of the principles of penal liability, and consequently not to make cases of abstention the basis of such responsibility.

In these circumstances the Japanese Delegates thought it possible to adhere, in the course of the discussions in the Commission, to a test which would eliminate from clause (c) of section (b) of Chapter IV both the words "including the heads of states," and the provision covering cases of abstention, but they feel some hesitation in supporting the amended form which admits a criminal liability where the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, put an end to, or repressing acts in violation of the laws and customs of war.

The Japanese Delegates desire to make clear that, subject to the above reservations, they are disposed to consider with the greatest care every suggestion calculated to bring about unanimity in the Commission.

M. ADATCI.
S. TACHI.

April 4, 1919

C E R T I F I C A T E

Statement of Source and Authenticity

I, HAYASHI, KAORU, Chief of the Archives Section, Japanese Foreign Office, hereby certify that the document hereto attached in English consisting of 20 pages and entitled "Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" is an exact and true copy of an excerpt of an official document of the Japanese Foreign Office.

Certified at Tokyo,
on this 17th day of February 1947.

(signed) K. HAYASHI
Signature of Official

Witness: (signed) K. URABE